IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-753–72-791

72-929

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Appellants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR., and ADAMINA RUIZ,

Intervenor-Appellants,

and

EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Appellant,

—against—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWAN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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The appellees herein make this motion pursuant to Rule 16 of the Rules of this Court to affirm the judgment of the District Court on the ground that the questions raised in the appeal are so insubstantial as not to require further argument.

Statute Involved

Chapter 414 of the New York Laws of 1972 is set forth as an Appendix to each of the Jurisdictional Statements filed herein.

Questions Presented

1. May a State, consistently with the Establishment Clause of the First Amendment to the United States Constitution, appropriate tax-raised funds for the maintenance and repair of nonpublic schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial and dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach?

2. May a State reimburse parents for tuition paid to such schools?

Statement of the Case

The appellees adopt the Statements of the Case as set forth in each of the Jurisdictional Statements filed herein.

ARGUMENT

I.

The Maintenance and Repair Provision

In *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso*, 403 U.S. 602 (1971), the Court held unconstitutional on their face Pennsylvania and Rhode Island statutes which appropriated tax-raised funds to pay part of the salaries of teachers of secular subjects in nonpublic schools. The basis for the decisions in both cases was that the statutes unavoidably involved the state in excessive entanglement with religious schools in violation of the Establishment Clause of the First Amendment.

In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the Court upheld in part the facial constitutionality of Title I of the Higher Education and Facilities Act of 1963 (20 U.S.C. Secs. 711-721) providing for Federal financing of construction of facilities at nonpublic as well as public colleges. The statute provides that for twenty years the financed facilities may not be used for sectarian instruction or religious worship.

The plurality opinion in *Tilton* distinguished *Lemon-DiCenso* on two grounds: First, *Tilton* involved colleges,

while *Lemon-DiCenso* involved elementary and secondary schools. Second, the *Tilton* statute authorized a one-time single purpose grant, while *Lemon-DiCenso* authorized continuing financial relationships.

Neither of these two distinguishing factors is present in Chapter 414. The beneficiaries of the Act are not colleges but elementary and secondary schools, and the financing takes place annually rather than only once for all time. Absent these two distinguishing factors, it is clear that the Act falls within the strictures of *Lemon-DiCenso*.

But most important is the Court's disposition of the twenty-year limitation in the Federal statute. Whereas the rest of the statute was held to be constitutional on its face (though not necessarily as applied) by a 5 to 4 vote, the Court was unanimous in invalidating the limitation. All the Justices agreed that buildings financed with tax-raised funds could never—not even after twenty years—be used for sectarian instruction or religious worship. In the present case, the statute on its face permits such use at all times, even within a day after the state grant is received. We submit such a law cannot stand under the decisions in *Lemon-DiCenso* and *Tilton*.

Finally, we note that even in *Tilton*, Mr. Justice White, whose vote made up the majority upholding the statute on its face, was careful to state that the statute would be unconstitutional even if no sectarian instruction or religious worship took place in the publicly financed facilities if "any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith." (403 U.S. at 671.) In the present case, it is conceded that the statute applies equally to schools which do exactly that.

We do not see how it is constitutionally significant that the qualifying schools must be located in low income areas. The Constitution of the United States extends to these no less than to other areas. We know of no decision of any court, state or Federal, which has ruled to the contrary and none is cited by appellants.

II.

The Tuition Grants Provision

The District Court was unanimous in holding unconstitutional the tuition grants provision of Chapter 414. So, too, were the District Courts in *Wolman* v. *Essex,* 342 F. Supp. 399, affirmed —— U.S. ——, 93 S. Ct. 61 (1972), and *Lemon* v. *Sloan,* 340 F. Supp. 1356 (1972). Appellants seek to distinguish the latter two cases on the ground that the statutes there provided tuition reimbursement for all children attending nonpublic schools, whereas Chapter 414 provides for reimbursement only to low income parents.

We are unable to see how this difference is constitutionally significant, nor do we know of any decision (and none is cited by the appellants) in which it was held that it is. We note further that the Rhode Island statute invalidated in *Earley* v. *DiCenso, supra,* was limited to teachers in low-income schools, i.e., those in which the average per-pupil expenditure was below that in the public schools, 403 U.S. at 607.

Tuition grant statutes are not a new device recently fashioned to evade constitutional prohibitions, state and Federal, against tax-financing of sectarian schools. As long ago as 1938, the New York Court of Appeals could say:

> • • • The courts of this country have been unanimous in prohibiting the use of public funds to pay directly or indirectly, tuition fees of pupils in private or sectarian schools. *Judd* v. *Board of Education,* 278 N.Y. 200, 215. Overruled on other grounds in *Board of Education* v. *Allen,* 20 N.Y.2d 109.

Our research has failed to disclose a single decision, state or Federal, which has upheld the constitutionality of tuition grant laws. The decisions to the contrary are legion. Among them are the following: *Williams* v. *Board of Trustees,* 173 Ky. 708 (1917); *Opinion of the Justices,* 259 N.E.2d 564 (Mass. Sup. Jud. Ct., 1970); *Almond* v. *Day,* 197 Va. 419, 89 S.E.2d 851 (1955); *Swart* v. *South Burlington School District,* 122 Vt. 177, 167 A.2d 514, *cert. den.,* 366 U.S. 925 (1961); *Hartness* v. *Patterson,* 179 S.E.2d 907 (S. Car. 1971).*

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* We cite here only cases decided under the Establishment Clause or its state equivalents. Decisions rejecting tuition grants as a means of evading the Equal Protection Clause are reviewed in the opinion in *Wolman* v. *Essex, supra,* and are equally unanimous.

CONCLUSION

For the reasons set forth herein the judgment of the District Court should be affirmed.

Respectfully submitted,

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